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82-653

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1982

E. NICHOLAS WADE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

To review the judgment of the Court of Appeals in *United States* v. *E. Nicholas Wade*, No. 81-2930, there on appeal from the District Court for the Northern District of Illinois, Hon. Stanley Roszkowski, District Judge presiding, 81 CR 365.

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E. Nicholas Wade respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED FOR REVIEW

May one person appear both as prosecutor and as witness in the same case before a federal grand jury? If not, is there an improper dual-capacity appearance when the assistant United States Attorney presenting a case for indictment, though not sworn as a formal witness, interjects his opinions and personal information into the proceedings to such an extent as to become a witness *de facto*?

PARTIES

There are no parties to this action other than those named in the caption.

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OPINION BELOW

There are no official or unofficial reports of any orders or opinions in the courts below. The unpublished orders of the District Court and of the Court of Appeals are included as appendix "A" and "B" to this petition.

JURISDICTION OF THE SUPREME COURT

The Court of Appeals for the Seventh Circuit affirmed Petitioner's convictions for violations of federal criminal statutes. Jurisdiction by certiorari lies to the Supreme Court under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V.:

> No person shall be held to answer for a capital, other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure, Rule (6(d):

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the grand jurors may be present while the grand jury is deliberating or voting.

STATEMENT OF THE CASE

This is a petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, which affirmed petitioner's convictions on seven counts of mail fraud and two counts of false statements to banks insured by the FDIC.

(a) Procedural History

This case was initiated by a nine-count indictment filed on July 14, 1981, by the Special November 1978 Grand Jury for the Northern District of Illinois. (C.1) All the counts were grounded upon alleged irregularity and fraud in the operation of Independence Land Title Corporation of Illinois, a title insurance company of which petitioner Wade was president. (C. 1) Seven counts charged Wade with mail fraud, in violation of 18 U.S.C. 1341, and the remaining two counts charged him with making false statements to FDIC insured banks, in violation of 18 U.S.C. 1014. (C. 1, pp. 8-11) The case was tried to a jury before the Hon. Stanley J. Roszkowski, District Judge of the Northern District of Illinois, Eastern Division.

Before trial Wade filed a motion to dismiss (C. 14) for misconduct of the assistant United States Attorneys in the manner of presenting the case to the grand jury. Excerpts from the grand jury minutes were attached to the motion. (C. 14)

The District Court denied Wade's motion to dismiss. (C. 18) Immediately prior to the beginning of trial, Wade filed in open court additional grand jury minutes in support of the motion, which the court agreed to receive. (R. 2-4)

On September 28, 1981, the jury found Wade guilty on all nine counts. He was sentenced, on November 24, 1981, to concurrent and consecutive terms amounting to three years in prison followed by five years of probation. (C. 50) He filed notice of appeal on December 3, 1981. (C. 51)

On August 19, 1982, the Court of Appeals for the Seventh Circuit affirmed the judgment and sentence of the District Court in an unpublished order. The full text of the order of the Court of Appeals appears as appendix "A" to this petition.

(b) Statement of Facts

The initial grand jury proceedings against petitioner took place before the October, 1980, Grand Jury. It was before this grand jury that most of the incidents underlying the motion to dismiss took place. Although the case was later transferred, for scheduling reasons, to the November, 1978, Special Grand Jury, the government conceded before the District Court that "the transcript of [assistant United State's Attorney] Reidy's [allegedly prejudicial] remarks was available to the Special November 1978 Grand Jury." (Supp. C. 1, p. 2)

During the taking of testimony before the grand juries, the assistant United States Attorneys presenting the case made statements relating to the evidence. These statements, which formed the basis for the motion to dismiss, cannot be effectively summarized and are set out in full as appendix "C" to this petition.

Because no allegation of trial error has been raised either before the Court of Appeals or on this petition, the evidence at trial is summarized here only in its essentials

Petitioner Wade operated two businesses. He was one of three equal partners in Fieldcrest Homes, which built residential housing for sale directly to consumers. He was also president of Independence Land Title Corporation of Illinois (Independence), a title insurance agency

issuing land title policies for U.S. Life & Casualty insurance company. Wade was also a licensed attorney, but was not engaged in the active practice of law.

At trial the Government introduced evidence to show that when houses built by Fieldcrest were sold, title policies were customarily issued by Independence, with Wade acting as title officer at closing. In substance, the Government charged that in a number of instances Wade received funds at closing for deposit in the escrow fund of Independence, to be used to pay off construction mortgages but that he converted these funds either to his own personal use or to the use of his other business, Fieldcrest. Evidence was introduced to show that Wade issued title policies guaranteeing the buyer's title against outstanding mortgages or other defects; that the underwriter, U.S. Life & Casualty, became liable for payment of undisclosed liens under these policies; that Wade caused the mails to be used in connection with these acts; and that in the course of this scheme false representations were made to banks insured by the FDIC.

BASIS OF FEDERAL JURISDICTION

This action was initiated by the Government as a criminal prosecution for alleged violations of 18 U.S.C. 1014 and 1341. The District Court acquired jurisdiction pursuant to 18 U.S.C. 3231.

ARGUMENT FOR ALLOWING THE WRIT

Present law provides inadequate guidance for the conduct of a prosecutor before a federal grand jury. The assistant United States Attorney presenting the case against Nicholas Wade for indictment allowed himself so much freedom of comment that on more than one occasion he displaced the witness on the stand and took over as a *de facto* witness himself.

Despite case law (see below) and ethical provisions, ABA *Standards, The Prosecution Function*, Sec. 3.5(b), ABA, *Code of Responsibility* (1975) EC5-9, which require a federal prosecutor to maintain scrupulous regard for the independence of the grand jury and to avoid interference with the grand jury's exercise of independent judgment in reviewing the evidence brought before it, the Court of Appeals found no impropriety in the way this case was presented for indictment. Indeed, it considered the extremely active role of the prosecutor not merely justified as proper summary of the evidence but even praiseworthy as a necessary explanation of what it called a "complex" and "ingenious" scheme. (Opinion of the Court of Appeals, Appendix, 4a)

Review of existing authorities reveals the absence of any definite boundaries beyond which the prosecutor may not step. As a result, both the United States Attorney before a grand jury and the court reviewing that prosecutor's conduct find themselves with only the vaguest and most general guidance. The Supreme Court should allow the writ of certiorari to establish as clear a rule as possible for a circumstance which, by its nature, requires a compromise between clarity and flexibility.

This Court's previous decisions have described the role of the grand jury as the "protector of citizens against arbitrary and oppressive government action," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) and to assure "protecting of citizens against unfounded criminal prosecutions," *Branzburg* v. *Hayes*, 408 U.S. 665, 686 (1972). Lower courts have frequently held that the Fifth Amendment declaration, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." requires that the grand jury which presents or indicts be fair and unbiased, *United States* v. *Gold*, 470 F. Supp. 1136 (N.D. Ill., 1979), *United States* v. *Samango*, 450 F. Supp. 561 (S.D.N.Y., 1978), *United States* v. *Provenzano*, 440 F. Supp. 1097 (D. Haw., 1977), *United States* v. *Di Grazia*, 213 F. Supp. 232 (N.D. Ill., 1963), and see *United States* v. *Dionisio*, 410 U.S. 1 (1973).

The grand jury is not, therefore, the tool or the agent of the prosecutor. As this court has held before, it is an investigating body of citizens, "acting independently of either prosecuting attorney or judge," *Stirone* v. *United States*, 361 U.S. 212 (1960). The prosecutor must maintain the fairness, impartiality and lack of bias of the grand jury, *United States* v. *Di Grazia*, 213 F. Supp. 232, 235 (N.D.Ill., 1963) and must not act in a way that overlooks inherent prejudice to the subject of the investigation, *United States* v. *Samango*, 450 F. Supp. 1097 (D. Haw., 1978). Even in the absence of specific prejudice it has been held improper for the prosecutor to overstep the bounds of fairly and objectively presenting evidence to the grand jury or to entertain a conflict of interest, *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill., 1979), or to play the roles of both prosecutor and witness be-

fore the same grand jury, *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill., 1979), *United States* v. *Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978).

At the same time, the prosecutor is not limited to the mere examining of the witnesses and recital of the applicable statutes. There is certainly some right to summarize the evidence for the grand jury. The best statement of this right remains that of Judge Augustus Hand in *United States* v. *Rintelen*, 235 F. 787 (S.D.N.Y., 1916).

The problem is that between a summary of the evidence presented, as in *Rintelen*, and the actual appearance of the prosecutor as a sworn witness before his own grand jury, as in *Gold* and *Treadway*, there lies a broad uncharted territory.

Present law does not, for example, answer the question whether a prosecutor who engages with excessive zeal in explaining the Government's point of view to the grand jury may become a *de facto* witness, improperly appearing in two roles at once and violating the prohibition against a witness remaining in the grand jury room after testifying, F.R.Crim. P. 6(d).

To take but a single instance from the present case, the following lengthy excerpt is from the proceedings before the first grand jury. Mr. Reidy is the assistant United States Attorney presenting the case. The witness on the stand is Eric Levin, a postal inspector in charge of the investigation. The prosecutor takes advantage of a question from a grand juror to break in on Levin's evidence, and to reply to the question in such length and detail as to effectively displace Levin and take over as witness himself in all but name. In addition, after laying out the Government's position and the conclusions

of his own investigation, the prosecutor intermittently turns to the witness for ratification of his own testimony. This is not the way presentation of evidence is supposed to work. The actual testimony reads as follows:

Q: (BY A JUROR)
The way I understand it, the first bank loaned money to Mr. Wade, he then sold these homes to the people that had bought them and claimed that they had paid for this insurance?

MR. REIDY:
Let me see if I can just run over that quickly again, and I will check with Mr. Levin who knows more about this than any of us to make sure that I am right. The first bank that you referred to is First Financial Savings & Loan of Downers Grove. They loaned Fieldcrest which is Mr. Wade and Miss Govern and Mr. Mitz a substantial amount of money for the construction of various homes on different pieces of property.

At some point, Fieldcrest then sells the home to an individual who pays the full price of the home and expects a substantial portion of that payment to be given to First Financial to satisfy their claim on the property based on their first loan.

What appears to be happening, and the allegation that we are investigating, is that sometimes that money instead of being used to pay off the first loan is diverted by Mr. Wade or someone in Independence Land Title to other purposes, meaning that the person who acquires the home acquires the home that has a substantial encumbrance or lien or debt on it with respect to the original loan from First Financial to build it because those loans apply not only to the individual who gets the money but to the land and the house and the property that was used—that the money was used to build.

Because Mr. Wade has arranged for title insurance for the individual, the title insurance company actually bears the responsibility of paying off the first mortgage; that is, the debt owed First Financial, and, therefore, the individuals who get the house in the two situations we are looking at does, in fact, get the house, has no prior mortgage on it and they get the house for the price they paid.

However, the title insurance company who was apparently led to believe that that first mortgage would be paid off ends up paying anywhere from $120,000 to $160,000 in order to make good on their title insurance. So, as far as we know presently, if there is a loss here the ultimate loss is to the title insurance company whose agent Mr. Wade is in getting the title insurance policy.

Is that pretty much correct, Mr. Levin?

A:

That is correct.

BY A JUROR:

Q:

When the people get the title from the title insurance company, did they receive a title saying it is clear? Did they receive a title saying this is a clear title?

A:

They were at the time of closing, a title policy was issued stating there was no previous mortgage commitment.

The person buying the home thought the only mortgage they had was to the bank they had secured their mortgage from.

Q:

But this is Mr. Wade's company that is giving them clear title?

A:

Yes.

MR. REIDY:
He is the broker, the local agent of the major company.
What the major company expects that he will not give that title to the individual until he has arranged to be very sure that the first loan is paid off. Everyone knows that there is a first loan, a construction loan on this property, but when the buyer comes with his check for $180,000, you will see them there in that package, he expects that the $160,000 of that will be applied to pay off the first mortgage; and that is what the loan papers say and you will see that.
The agent to do that is the land title company. In this case, Independence Land Title who takes it and puts it into their escrow account which as many of you know means it is a special account, not my money, held for purposes of paying off somebody else's debt; and therefore, they expect the First Financial, the first loan to be paid off as a result of those proceeds.
Given that the money has gone into an escrow account rather than wait until they actually ascertain from First Financial in order to have a closing really be a closing, that is, have all things over on that day, they provide the title insurance policy based upon the representations of their local agent that he will take care of paying off the first loan.
BY A JUROR:
Q:
E. Nicholas Wade was the local agent for Independence Land Title which is the local agency of U.S. Title Insurance Company?
A:
That is correct.

MR. REIDY:

Q:

I believe, and you can correct me if I am wrong, that E. Nicholas Wade essentia ly is Independence Land Title Corporation.

A:

That is correct. He had Kane County.

Q:

He has that corporation for — in order to be an agent of U.S. in Kane County.

A:

That is correct.

MR. REIDY:

And he essentially owns that corporation. He serves as agent or broker of the national corporation.

A JUROR:

In other words, it is just a franchise of the name?

MR. REIDY:

Well, that is one way of putting it.

Really, he is a broker, an agent of theirs. He acts as an agent in collecting title insurance fees because there is a fee connected with all of this, and he acts as their local agent. It is kind of a franchise. That is not a bad analogy.

A JUROR:

Who asked for the investigation to begin with and how long has this been?

MR. REIDY:

Q:

Eric [witness Eric Levin], can you do that better than I can?

. . .

BY THE FOREPERSON:

Q:

I heard the date 1975 it seems to me mentioned in connection with one of these checks.

Yet, as I understand it, Fieldcrest was formed in 1977. Was 1975 inadvertant?

MR. REIDY:
I may have misspoke if I said 1975 or if Mr. Levin said 1975.
Apparently I did. If I did, I was wrong.
. . .
I appreciate your checking me or that.
Yes, ma'am?
A JUROR:
I just wanted to get something clear. The mail fraud part of this is all these checks being passed back and forth through the mails, is that how it comes into effect?
MR. REIDY:
We have yet to finally nail down what mailings would be involved if we were going to make any charges but you have correctly identified the area we will look.
In any mailing that is caused you don't have to take a letter and put it in a mailbox under the law if you just conduct business in a way that causes mailings to occur or even if you cause yourself to receive mail and it is in connection with a fraud, that is enough to trigger our statute.
We don't expect frankly that there is going to be any difficulty finding a number of mailings in connection with these financial transactions.
. . .
BY A JUROR:
Q:
The sold 20 homes approximately?
A [Eric Levin]:
The first year of operation.
Q:
The first year, and out of those 20 homes only these two are in the case?
A:
No.

Q:
So far?
A:
The situation was when Fieldcrest Homes Incorporated started in '77 it was a good housing market. Houses were selling quite rapidly.
We have not found any dating back to that early time at all.
These homes you see were closed in the end of December of 1979, beginning of January 1980.
The housing market was booming when Fieldcrest was formed. These are much later, two years later.
BY MR. REIDY:
Q:
In other words, of the 20 houses that I referred to as their having been sold in the first period, we have no reason to believe that this particular failure to pay off the first loan occurred on any of those, and I suspect we would know by now.
A:
Correct.
MR. REIDY:
It wouldn't take them three years to discover that their loan wasn't paid off.
It is only in the late '79 and early '80 when the housing market became depressed and housing sales were down all over, and I think particularly in the very, very expensive housing range that we find this occurring.
What we are going to have to look at to see whether or not it was a result of a press of bills that probably occurred as a result of a slowdown in the housing market that caused them to need these extra funds.
BY A JUROR:
Q:
Did they know the people? I mean, does Mr. Wade or Miss Govern, does she know the people that she

sold the homes to like on a personal basis or contact of any kind?

A:

I can only make an assumption there. I couldn't give a definite answer.

Mr. Wade was the closing officer so he would have met the people.

Q:

I meant knew them personally?

A:

No, these were people that come in from out of town and they were transferred here and were looking for a home and they saw Fieldcrest and found homes they liked.

MR. REIDY:

She may have had some professional contact with them as a real estate broker, but we don't have any reason to believe she was selling to friends.

. . .

MR. REIDY:

Let me see if I can make it absolutely clear what the allegation is.

If this turns out to be correct, this will not be an allegation of having made a bad business judgment. This allegation is that Wade took money from the purchaser of the house, took the hundred and sixty-two or the hundred twenty-three thousand that had been set aside according to the closing papers for the payment of the prior mortgage and instead of paying off the prior mortgage he used the money for his own benefit or his own purposes.

What we really have is not a bad business judgment if this is correct but an embezzlement.

. . .

That's the ultimate result if these facts prove true.

If there are no further questions, I would ask the foreman to excuse Mr. Levin . . . . Unless there are questions of me, I am also through.

A JUROR:
What was Mr. Wade's reaction when you addressed him with confrontation? Was there any—

MR. REIDY:
My only dealings with Mr. Wade were immediately prior to coming here in the Grand Jury other than calling him and arranging for him to appear here.

A JUROR:
He had no inkling of why he was here?

MR. REIDY:
No, he had been told. I told him why he was here. I told him we were investigating the possible fraud with respect to Fieldcrest Homes and Independence Land Title and the loss of money, and the agents have told him that prior to when they came to get his—

No, I did tell him specifically why he was here and I had also told Miss Govern's lawyer why she was here; and in fact, they both knew that prior to coming here. They all knew why they were here and they elected to stand on the Fifth Amendment privilege.

A JUROR:
Their own attorneys, wouldn't those attorneys have suspected something?

MR. REIDY:
As far as I know, no.
There is no reason for them to suspect anything. I don't know how many of you have ever purchased homes, but I never checked to see whether or not the prior mortgagee was being paid off other than to see that that was said in the paper and that there was a check created for that purpose.
You can see if you look at those papers there is every reason to believe that Independence Land Title is paying off the loan.

A JUROR:
Every time we bought a home, they always brought it down to title and trust and it was at the time of closing always presented to the attorney who was representing us.
MR. REIDY:
That is right but all he would have seen, at least in many cases, I don't know about your particular case, is a check that says it is addressed to the prior lien holder, the prior mortgage holder, and that is frequently given to an escrow agent, sometimes the real estate agent if it is a real estate sale, sometimes a title agent if there is a title involved, and then he takes care of actually transferring it to the prior bank. Sometimes the bank will do that as well.
Somebody other than the attorney actually carried the checks to pay off the prior loan over to the old bank and hands it to them.
We are always, I think, at a closing relying on somebody to do that unless the same bank is handling both loans.
All right. It is up to you, ladies and gentlemen.

This degree of participation goes well beyond mere summary. The prosecutor has dislodged the witness on the stand and is in fact testifying as to petitioner's motive, evidence to support the element of mailing, and as an expert on real estate closing practice. Nor is this extensive passage the only instance when the prosecutor found it difficult to maintain the distinction between the role of U.S. Attorney and that of witness or case agent. Other instances are set out in appendix "C".

The Court of Appeals found these instances, individually and taken together, to be within the bounds of

permissible summary of the evidence. They were not. It may be acceptable for the prosecutor to come before the grand jury at the close of all the evidence and succinctly point out how the testimony of various witnesses fits together, and how evidence has been presented on the required statutory elements of the crime on which an indictment is sought. It is quite another matter for the prosecutor, while a witness actually sits upon the stand under oath, to take over the presentation of the evidence in the witness's stead. This can no more be countenanced before a grand jury than would the behavior of a prosecutor who sought to give explanatory argument in the middle of a trial while a witness was before the jury.

Petitioner agrees with the Court of Appeals that there is language in the *Rintelen* decision, and in the *Perlin* decision also cited below, *In re Perlin*, 589 F.2d 260 (7th Circuit, 1978), which can indeed be read as approving the conduct of the prosecutor here. Yet such far-reaching intrusion into the testimony before the grand jury, making the prosecutor a witness *de facto*, if not in form, ought not to be permitted. The very existence of such authority is all the more reason for review in the Supreme Court. A writ of certiorari should be allowed so that this Court may determine the actual permissible limits of prosecutorial summation and explanation before the federal grand jury.

CONCLUSION

WHEREFORE, Petitioner E. Nicholas Wade respectfully requests that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment there entered in this cause.

Respectfully submitted,

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